

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

78-377

GILBERT D. SCUDDER,

Appellant,

VS.

FLORIDA POWER CORPORATION, a Florida corporation, L. M. FOLSOM and PAULINE FOLSOM, his wife,

Appellees.

On Appeal From the District Court of Appeal of Florida, Second District

JURISDICTIONAL STATEMENT

Jack b. Wichols, Esquire R. Wayne Evans, Esquire P.O. Box 33 Orlando, Florida 32302 335/641-8023 Attorneys for Appellant

# INDEX

		Page
Opinion b	pelow	1
Jurisdict	tion	1
	tional and Statutory visions Involved	7
Questions	s Presented	11
Statement	t	14
	Federal Questions Were sed and Decided Below	21
	ral Questions Substantial	28
1.	Florida Statutes, Sections 704.01(2) and 704.04, are unconstitutional by permitting the taking of Plaintiff's property for the use and benefit of private property owners in violation of the Plaintiff's rights to due process of law	
2.	The manner of the taking of Plaintiff's property pursuant to Florida Statutes, Sections 704.01(2) and 704.04 violated Plaintiff's rights to due	4.2
	process of law	43

3.	Florida 704.01 uncons these provide for the Plaint violate tiff's process altern state lated process to tax against the exincurred damage taking	(2) stitu stat le ju le ta liff' ion s rig s of lativ cour the ss ri st th spens red i es an	and tion utes st c king st pr of t hts law e, t plai ghts orne es t n pr d de	704 al fa omp of ope he to he elo nti by fen he ovi	beca il t ensa the rty Plai due In t ff's fai fee dant Plai ng l	interior distribution in the distribution in t	on la la lue for if	rif	51
4.	Florid 704.01 constr state uncons permit the Pl in vio	cued cour stitu ting laint olati	and by t ts b tion the iff' on o equa	704 the selo	Flow, a by parties of the corotes of	ricare per g c	la e of		65
		4							
Conclusio	on .			•		•	•	•	74
Proof of	Servi	ce .							79

6

# TABLE OF CASES

<u> </u>	PAGE
FEDERAL:	
Chicago B & Q Railroad Co. v. Illinois, 200 U.S. 561, 26 S. Ct. 341 (1906)	56
Lamm v. Volpe, 449 F. 2d 1202, (10th Cir. 1971)	56
Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1962)	71
Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977)	71
STATE:	
Adams v. Housing Authority 60 So. 2d 633 (Fla. 1953)	, 59
Broward County v. Bouldin, 114 So. 2d 737 (Fla. 3d DCA 1959)	54,61
Dade County v. Oolite Rock Co., 311 So. 2d 699 (Fla. 3d DCA 1965)	54
Deseret Ranches of Florida Inc., v. Bowman, 349 So. 2d 155 (Fla.1977	60,64,65

## PAGE

Estate of Hampton v. Fair- child Florida Construction	27,35,58,59, 60,64,65
Co., 341 So. 2d 759 (Fla. 1977	)
Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (1969)	38
Jacksonville v. Schumann, 223 So. 2d 749 (Fla. 1st DCA 1969)	54
South Dade Farms, Inc. v. B & L Farms Co., 62 So. 2d 350 (Fla. 1952)	29,30,31,34, 52
State v. Stewart, 120 So. 335 (Fla. 1929)	56
Stein v. Darby, 126 So. 2d 313 (Fla. 1st DCA 1961)	32,34,53,57

# FOREIGN:

In re Board of Rapid Transit 56
Railroad Commissioners,

128 Appellate Division of
New York 103, 112 N.Y. Supp.
619 (S. Ct. of N. Y. 1908)

## JURISDICTIONAL STATEMENT

### OPINION BELOW

The Opinion of the Supreme Court of Florida denying the Appellant's Petition for Writ of Certiorari is set forth in the Appendix at page A 1. The Opinion of the District Court of Appeal of Florida, Second District, is reported at 350 So. 2d 106 (Fla. 2d DCA 1977), and is set forth in the Appendix at page A 3.

#### JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(2), this being an appeal which draws into question the validity of Florida Statutes, Sections 704.01(2) and 704.04, on the ground that they are repugnant to the Constitution of the United States.

Appellant, Gilbert D. Scudder

(hereinafter "Scudder," "Plaintiff," or "Appellant,"), a resident of New York, filed an action against the Appellees,
L. M. Folsom and Pauline Folsom (hereinafter "Folsom") and Florida Power
Corporation (hereinafter "FPC") for trespass on the property appellant owned in Florida (A 17-45).

The Defendants Folsom, who owned land adjacent to the Plaintiff's property, had constructed a clay road across the Plaintiff's property and directed the Defendant FPC to install a distribution line following the aforesaid road to the Defendants' residence. As will be demonstrated later in this brief, the Defendants Folsom and FPC wilfully trespassed upon the Plaintiff's property, knowing they did not have the Plaintiff's consent or any legal right to conduct their aforesaid activities upon his property. In response to the Plaintiff's action and to purge themselves of their trespass, the Defendants alleged by way of affirmative defense and counterclaim that a right of way over Plaintiff's property (1) was established by prescriptive easement, (2) constituted a common law way of necessity, or (3) was permissible as a statutory way of necessity under Florida Statutes, Section 704.01 (A 46-76).

On April 14, 1976, the Circuit

Court of the Fifth Judicial Circuit, in and for Lake County, Florida, Judge

Wallace E. Sturgis, Jr., presiding, awarded the Defendants Folsom a statutory way of necessity pursuant to

Florida Statutes, Sections 704.01(2) and 704.04, for ingress and egress, electricity, and telephone servics, to the extent of 30 feet in width along the clay road built by the Folsoms across

Plaintiff's property (A 77-104).

However, the court determined that the Defendant FPC trespassed upon the

Plaintiff's property because the said Defendant's use of the easement was not in an orderly and proper manner as required by Florida Statutes, Section 704.01(2) (A 93). In particular, the court found that the Defendant's utility poles were not within the 30foot easement granted by the court and were not even reasonably located in relation to the clay road and the aforesaid easement (A 92). Furthermore, the court determined that FPC followed a policy when installing the distribution lines which gave little or no consideration to the property rights of landowners, including the Plaintiff, such that the trespass was wilful, intentional, and with reckless indifference to the Plaintiff's property rights (A 94-97). The Plaintiff was awarded \$7,400.00 in compensatory damages against the Defendants Folsom, \$500.00 in compensatory damages against FPC for the taking of the

Plaintiff's property, and the sum of \$25,000.00 punitive damages against FPC for its wilful trespass upon Plaintiff's property (A 100).

The trial court acknowledged that the statutes Defendant relied upon, Florida Statutes, Sections 704.01(2) and 704.04, appeared to violate the Plaintiff's constitutional rights as protected in the Constitution of the State of Florida and the United States Constitution. However, the court ruled that such a determination of constitutionality would have to be made by the appellate court (A 105-123).

On appeal, the District Court of Appeal of Florida, Second District, rejected the Plaintiff's constitutional challenge of Florida Statutes, Sections 704.01(2) and 704.04, vacated the awards of compensatory and punitive damages against FPC, shifted liability for the \$500.00 compensatory damages against FPC

to the Folsoms, and affirmed the trial court's judgment in all other respects (A 3-16). Scudder's Petition for Rehearing was denied by the Second District on October 21, 1977 (A 124). On June 6, 1978, the Supreme Court of Florida denied Plaintiff's Petition for a Writ of Certiorari (A 1), which again attacked the constitutionality of the statutes in question. Notice of Appeal to this Court was timely filed on July 21, 1978 (A 126).

As the Supreme Court of Florida,
Second District Court of Appeal, and the
Circuit Court of the Fifth Judicial
Circuit, in and for Lake County, Florida, have all rejected the Plaintiff's
constitutional challenge to Florida
Statutes, Sections 704.01(2) and 704.04,
this matter is appropriately brought to
this Court by appeal. In the event that
this Court does not consider appeal the
proper mode of review, Appellant requests

that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C., Section 2103.

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Plaintiff/Appellant files this appeal as a resident of the State of New York who has been denied his constitutional rights as guaranteed by the First, Seventh, and Fourteenth Amendments to the Constitution of the United States and Article I, Declaration of Rights, Section 21, and Article X, Section 6(a) of the Constitution of the State of Florida, by the courts and legislature of the State of Florida. This case also involves Florida Statutes, Sections 704.01(2) and 704.04, which state:

704.01(2) Statutory way of necessity exclusive of common law right.-Based on public policy, convenience and necessity, a statutory way of necessity exclusive of any common law right exists when any land or

portion thereof outside any municipality which is being used or desired to be used as a dwelling or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof or anyone in their behalf lawfully may use and maintain an easement for persons, vehicles, stock and electricity and telephone service over and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided, that such easement shall be used only in an orderly and proper manner.

704.04 Judical remedy and compensation to servient owner. When the owner or owners of such lands across which a statutory way of necessity under Section 704.01(2) is claimed, exclusive of the common law right, objects or refuses to permit the use of such way under the conditions set forth herein, or until he receives compensation therefor, then either party or the board of county commissioners, of such county may file suit in the circuit court of the county wherein the land is located in order to determine if the claim for said easement exists, and the amount of

compensation to which said party is entitled for use of such easement. Where said easement is awarded to the owner of the dominant tenement, it shall be temporary and exist so long as such easement is reasonably necessary for the purposes stated herein. The court, in its discretion, shall determine all questions including the type, extent and location of the amount of compensation, provided that if either of said parties so request in his original pleadings the amount of compensation may be determined by a jury trial. The easement shall date from the time the award is paid.

The provisions of the Constitution of the State of Florida involved in this case are as follows:

Declaration of Rights, Article I:

Basic rights

All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

9. Due process

No person shall be deprived of life, liberty or property without due process of law, or be twice put in

jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

### Article X:

6. Eminent domain

- (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
- (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

### QUESTIONS PRESENTED

The questions presented by this appeal are the following:

- l. Whether the taking of the Plaintiff's property pursuant to a statutory way of necessity, as provided in Florida Statutes, Section 704.01(2), upheld as constitutional by the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, the Second District Court of Appeal, and the Florida Supreme Court, violates the Appellant's rights to due process of law as protected in the First and Fourteenth Amendments to the United States Constitution.
- 2. Whether Florida Statutes,
  Sections 704.01(2) and 704.04, upheld as
  constitutional by the Circuit Court of
  the Fifth Judicial Circuit, in and for
  Lake County, Florida, the Second District Court of Appeal, and the Florida
  Supreme Court, violate the Appellant's

- rights to due process of law as protected in the Fourteenth Amendment to the United States Constitution by failing to award just compensation to the Appellant for the taking of his property pursuant to the aforesaid statutes.
- 3. Whether Florida Statutes,
  Sections 704.01(2) and 704.04, upheld as
  constitutional by the Circuit Court of
  the Fifth Judicial Circuit, in and for
  Lake County, Florida, the Second District Court of Appeal, and the Florida
  Supreme Court, violate the Appellant's
  rights to equal protection under the law
  as protected in the Fourteenth Amendment
  to the United States Constitution by the
  taking of the Appellant's property
  pursuant to the aforesaid statutes.
- 4. Whether Florida Statutes,
  Sections 704.01(2) and 704.04, upheld as
  constitutional by the Circuit Court of
  the Fifth Judicial Circuit, in and for
  Lake County, Florida, the Second Dist-

rict Court of Appeal, and the Florida
Supreme Court, violate the Appellant's
rights to redress of injury as protected
in the First and Fourteenth Amendments
to the United States Constitution by the
taking of the Appellant's property
pursuant to the aforesaid statutes.

1ant's property pursuant to Florida
Statutes, Sections 704.01(2) and 704.04,
upheld as constitutional by the Circuit
Court of the Fifth Judicial Circuit, in
and for Lake County, Florida, the Second
District Court of Appeal, and the Florida Supreme Court, violate Appellant's
right to trial by jury, as protected in
the Seventh and Fourteenth Amendments to
the United States Constitution.

#### STATEMENT

In April of 1973, Defendants Folsom began negotiations to purchase an 80acre parcel of land in Lake County adjacent to real property owned by the Plaintiffs Scudder. Before closing the transaction and acquiring title to the said property the Folsoms promptly proceeded to construct a clay road upon the Plaintiffs' property from the east line of the property they were purchasing (a common boundary with the Plaintiffs' property) along the northern shore of Flat Lake to an existing clay road which ran approximately 2½ miles east to the nearest paved road to the east. During the time the road was being constructed the Folsoms applied to FPC for electric service to the property.

On or about October 12, 1973, the
Plaintiff Gilbert D. Scudder was advised
by a grove caretaker's telephone call of

the trespass upon his property and he caused his attorney to contact the Folsoms and advise them that the road was across his property without his consent or permission. Scudder caused fences to be built across the road and had "no trespassing" signs posted on both the east and west boundaries of his property at the point where the freshly built road entered his property. Within forty-eight hours the fence was found to be broken at the entry of said road to the Plaintiff's property. Thereafter, the Defendants Folsom directed FPC to construct the utility line across the Plaintiffs' property to their property without the Plaintiffs' permission. Three poles with lines traversing the shore line of Flat Lake were placed on the Plaintiffs' property on or about November 6, 1973. Plaintiffs thereafter brought suit against the Defendants Folsom and FPC for trespass and ejectment, seeking the removal of the road and the power lines and damages for trespass.

Plaintiffs, Gilbert D. Scudder and his wife, Irene, brought two separate actions. One action was in trespass against FPC for the wrongful placement of three wooden utility poles along the lakefront portion of Plaintiffs' 120-acre citrus grove in Lake County, Florida. The second action was brought by Plaintiffs against the Defendants Folsom, the landowners of an adjacent 80-acre parcel, adjoining Plaintiffs' property on the west. The action against the neighboring Folsoms was for the wrongful trespass and construction and use of a clay road across the lakefront portion of the Plaintiffs' land. The two actions were consolidated. Plaintiffs demanded judgment for ejectment of Defendants, damages for trespass, and in the alternative, damages for inverse condemnation

as a result of the construction of the clay road and power lines over their property.

By way of defense and counterclaim,
Defendants FPC and Folsom alleged that
the right of way over Plaintiffs' property (1) was established by prescription, (2) constituted a common law right
of way of necessity, or (3) was permissible as a statutory way of necessity
under Section 704.01(2), Florida Statutes. The Defendants' claims for an
easement, including a statutory way of
necessity, were raised for the first
time in defense to the Plaintiffs' claim
of trespass.

After consolidation, FPC filed a
Crossclaim against Co-Defendants, Folsom,
asserting that Folsoms were liable to
FPC for all or a portion of Plaintiffs'
claim against FPC and seeking indemnification for any damages for which FPC
might ultimately be held liable to

Scudders.

At the time of trial, Plaintiff Irene J. Scudder was deceased, and the trial proceeded with Gilbert D. Scudder as sole Plaintiff. The order of trial was altered, over the objections of the Plaintiff that his constitutional right to trial by jury was being violated. The Court first received evidence as to the legal, nonjury issues raised by the Defendants on the issue of inverse condemnation. Only after these issues were decided did the Court consider the remaining issues of trespass, compensation and damages.

In its Final Judgment (A 88-90),
the Court held that no prescriptive easement existed for the road and that the
requirements for a common law right of
way had not been established. The Court
determined, however, that Defendants
Folsom were entitled to a statutory way
of necessity over Plaintiff's property

in accordance with Section 704.01(2),
Florida Statutes, not to exceed 30 feet
in width, traversing the shore of Flat
Lake from Folsoms' east boundary across
Plaintiff's property to an existing clay
county road known as Phil Peters Road.
This easement across the Plaintiff's
property was created as a statutory way
of necessity after the trespass had
occurred and suit was pending, for the
purpose of granting Folsom legal ingress
and egress, electricity and telephone
service over Scudder's property.

The Court in its Final Judgment also determined that FPC was guilty of trespass and liable to the Plaintiff for \$500.00 compensatory damages and \$25,000.00 punitive damages (A 100), on the basis of its finding that the location of its two wooden utility poles were not placed within the 30 foot wide easement as defined by the court, and the evidence established that the tres-

pass committed by FPC was the result of a company policy which constituted a wilful, intentional, and reckless indifference to the property rights of the Plaintiff (A 92). As just compensation for the use of the statutory way of necessity, the court further ruled that the Plaintiff should recover from the Defendants Folsom the sum of \$7,400.00 damages for the value of the easement being taken (A 100). Finally, the court denied FPC's crossclaim against the Folsoms for indemnification (A 101).

# HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Plaintiff initiated this litigation by filing Complaints against the Defendants Folsom and FPC for damages for trespass and ejectment, and to enjoin the Defendants from continuing to trespass upon his property (A 17-45). A trial by jury was requested by the Plaintiff on these issues (A 17-30). Notwithstanding the Plaintiff's request for trial by jury on his action in trespass, the trial court entered an order that it would try all equitable issues without a jury (A 129). In effect, the order denied the Plaintiff his right to a jury trial on his trespass action against the Defendants. Also, by trying all equitable issues without a jury, the court altered the order of trial by initially taking testimony and evidence on the affirmative defenses raised by the Defendants,

including statutory way of necessity,
such that the Plaintiff was required to
defend the Defendants' claims for an
easement across his property even though
the Plaintiff was the victim of intentional trespasses by the Defendants.

(A 132-139). This order was entered
after Defendant FPC made an oral motion
without notice to the Plaintiff during a
hearing on Defendant FPC's Motion to
Compel Plaintiff to Elect Remedies

(A 129, 140).

The Plaintiff subsequently moved to quash the aforesaid order of the trial court contending that the court's decision to try all issues without a jury and alter the order of trial violated the Plaintiff's constitutional rights to a trial by jury and due process of law, as protected in the Seventh and Fourteenth Amendments of the United States Constitution (A 145). The Plaintiff's Motion to Quash was denied by the court

and the court proceeded to hold a nonjury trial on the equitable issues raised by the affirmative defenses of the Defendants on February 16, 1976 (A 149).

The Court's order denied the Plaintiff his right to go forward with the evidence on his case in chief in trespass against the Defendants before a jury. Instead, the Defendants were permitted to present their evidence to the court first on their affirmative defenses, which included their claim for a statutory way of necessity. The court considered evidence and subsequently entered its order holding that the Plaintiff would not be allowed a jury trial on the issue of trespass against the Defendants Folsom (A 152). After the court awarded a statutory way of necessity to the Defendants Folsom and had indicated its intentions to proceed with the jury trial against the

Defendant FPC straight through the weekend without a recess for the jury, the parties agreed to discharge the jury. Thereafter, the court received evidence on the question of trespass against FPC solely and considered the matter of damages for the taking of the right of way (A 158).

As supported by the record, including the proceedings at trial (A 145, 162), the Plaintiff vigorously objected to the court's denial of the Plaintiff's constitutional right to present his case in chief to the jury before the Defendants' affirmative defenses were heard and the denial of his right to opening and closing statements on his claims against the Defendants Folsom and FPC for trespass upon his property and a judgment to recover his property. On appeal, the Plaintiff raised these constitutional issues before the Second District Court of Appeal; however, the Plaintiff's

argument was not accepted (A 10).

During the course of the trial, when the court was receiving evidence of the Plaintiff's damages for the taking of his property pursuant to a statutory way of necessity granted by the court, the Plaintiff was not permitted to offer into evidence the attorneys' fees he incurred in defending his property rights. The Plaintiff did proffer said testimony for the record (A 113). However, the trial court refused to tax the Plaintiff's attorneys' fees against the Defendants as just compensation for the taking of his property on the ground that the fees were not provided for as taxable costs under Florida Statutes. The Plaintiff challenged the constitutionality of the aforesaid statutes, contending that his property was taken without just compensation (A 109). In addressing this issue, the trial court opined that in failing to provide for

attorneys' fees and costs the aforesaid statute was unconstitutional, but the trial judge stated he would leave the constitutional questions for the appellate courts (A 112).

On appeal, the Plaintiff again attacked the constitutionality of Florida Statutes, Sections 704.01(2) and 704.04 on the ground that the taking of the Plaintiff's property pursuant to the aforesaid statutes violated the Plaintiff's constitutional rights to due process of law, equal protection under the law, and redress of injury, as protected in the Seventh and Fourteenth Amendments to the United States Constitution. However, the Second District Court of Appeal specifically rejected the Plaintiff's constitutional attack and upheld the validity of the aforesaid statutes. In particular, the court declared: "Further, the trial court was correct in not awarding counsel fees to

the Scudders, as there is no right to an award of attorneys' fees to a servient landowner where a way of necessity is established. Estate of Hampton v. Fair-child Florida Construction Co., 341 So. 2d 759 (Fla. 1977)." (A 10). These same constitutional points were again presented to the Florida Supreme Court in Scudder's Petition for a Writ of Certiorari. The Supreme Court of Florida denied this petition on June 6, 1978 without opinion (A 1).

Notice of Appeal to this Court was timely filed on July 21, 1978 (A 126).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In reviewing the record in the instant case it is apparent that the constitutional rights of the Plaintiff, Gilbert D. Scudder, a resident of New York State who owned real property in the State of Florida, were violated by the trial and the appellate courts of the State of Florida construing Florida Statutes, Sections 704.01(2) and 704.04. Substantial federal questions have been raised in the instant case as to whether the aforesaid constitutional rights of a nonresident can be transgressed by Florida state courts in the name of a statutory way of necessity. In essence, this case turns on the question of whether the public interest of the State of Florida as construed by the Florida State courts are paramount to the property rights of a non-resident as protected in the United States Constitution

and the Constitution of the State of Florida.

Florida Statutes, Sections 704.01(2) and 704.04, are unconstitutional by permitting the taking of Plaintiff's property for the use and benefit of private property owners in violation of the Plaintiff's rights to due process of law.

The constitutional problems inherent in Florida Statutes, Sections 704.01(2) and 704.04 are readily apparent in reviewing the history of the aforesaid statutes, for the constitutionality of these statutes has been consistently challenged. Indeed, Section 704.01(2) was previously declared unconstitutional by the Florida Supreme Court in South Dade Farms, Inc. v. B. & L. Farms Co., 62 So. 2d 350 (Fla. 1952); Florida Statutes, Chapter 704, as amended in 1953, represents an attempt by the Florida legislature to cure the constitutional defects as pronounced in South Dade Farms.

In the South Dade Farms decision, supra, the Florida Supreme Court held that Florida Statutes, Section 704.01 violated the due process clauses of the Constitutions of the United States and the State of Florida. According to the court, a statutory way of necessity provided for under Section 704.01 amounted to the taking of property without just compensation.

Furthermore, the court specifically declared that Section 704.01 violated the due process clause by permitting the taking of private property for the use of a private owner. In addressing itself to this point the court stated:

"Of course, in this instance the taking would have no semblance even of basis in the police power. It is purely a matter of taking from one private owner for the use of another private owner.

"When the state attempted, by the statute, to accomplish what would result were the present order enforced, its act constituted a violation of the provision that no state shall 'deprive any person of

\* \* \* property, without due process of law \* \* \*.' Also the Florida constitutional provisions found in the Declaration of Rights that a person shall not 'be deprived of \* \* \* property without due process of law \* \* \*' would be violated, not to mention the provision that private property shall not be 'taken without just compensation.'"

Id. at 351, emphasis added.

Clearly, therefore, the Florida Supreme
Court in South Dade Farms, supra, held
that Florida Statutes, Section 704.01
violated property owners' rights to due
process of law by authorizing the
taking of property without just compensation and by permitting the taking from
one private owner for the use of another
private owner.

In an attempt to cure the constitutional infirmity of Section 704.01, as
enunciated by the Florida Supreme Court
in South Dade Farms, supra, the Florida
legislature amended Florida Statutes,
Section 704.01, and further enacted
Section 704.04, which provides that a
hemmed-in property owner may petition

the circuit court for a statutory way
of necessity if his neighboring owners
do not consent to the use of their
property; this section also provides
compensation to be awarded to the servient landowner for the taking of his
property in the event the court awards
a statutory way of necessity.

The constitutionality of both Sections 704.01(2) and 704.04 was then challenged in Stein v. Darby, 126 So. 2d 313 (Fla. 1st DCA 1961). In the Stein decision, the aforesaid statutes were attacked on the ground that the statutory way of necessity primarily benefitted the private landowner rather than serving a public purpose. The First District Court of Appeal upheld the constitutionality of Florida Statutes, Sections 704.01(2) and 704.04, holding that the result contemplated by the aforesaid statutes serves a public purpose as distinguished from

a public benefit and considerations of public policy justify provision by the legislature of a means of access to landlocked property. <u>Id</u>. at 316-318. According to the court, the benefit to the private landowner was merely incidental to the accomplishment of the public use. Id. at 320.

In further justification of the constitutionality of the aforesaid statutes, the Court declared that Article XVI, Section 29, of the Florida Constitution implied that the legislature could delegate the power of eminent domain for the purpose of acquiring an easement to landlocked property on the condition that full compensation was paid to the owner. Id. at 321. Article XVI, Section 29, cited by the court, provided:

Condemnation of property; compensation. -- No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation

therefor shall be first made to the owner, or first secured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

Without any question, therefore, the nature of the necessity provided for in Florida Statutes, Chapter 704, was clearly related by the appellate court to an eminent domain proceeding.

Although the decision of the First
District Court of Appeal in Stein v.

Darby, supra, apparently conflicted with
the opinion of the Florida Supreme Court
in South Dade Farms, supra, on the issue
of taking property for the public use,
the Florida Supreme Court denied certiorari in the Stein case. Stein v. Darby,
134 So. 2d 232 (Fla. 1961). According
to the Florida Supreme Court, the
Petition for Certiorari was premature as
the facts of the case were not set and

no relief had been determined at that time. <u>Id</u>. at 237.

Recent decisions of the Florida Supreme Court in the Estate of Hampton v. Fairchild-Florida Construction Co., 341 So. 2d 759 (Fla. 1976) and Deseret Ranches of Florida, Inc. v. Bowman, 349 So. 2d 155 (Fla. 1977), have completely confused the grounds supporting the constitutionality of Florida Statutes, Sections 704.01(2) and 704.04. Until the Hampton decision, supra,, was decided, Florida Statutes, Chapter 704, was apparently constitutional on the ground that a statutory way of necessity served the public purpose in the nature of an eminent domain proceeding. In Hampton, however, the Florida Supreme Court specifically rejected the view that Chapter 704 related to an eminent domain proceeding. As stated by the Court, "(P)roceedings to establish a statutory way of necessity do not stand

on the same footing as condemnation actions...". Id. at 761. This deviation by the Florida Supreme Court from the traditional view served to justify the holding by the court that there is no basis for an award of attorneys' fees in statutory way of necessity actions, although attorneys' fees are provided in eminent domain proceedings. Id.

As statutory way of necessity proceedings no longer stood on the same footing as eminent domain proceedings by the <u>Hampton</u> decision, <u>supra</u>, the constitutionality of the taking was shaken.

It could only be implied from the opinion of the Supreme Court that the legislature did not delegate its power of eminent domain to a property owner for the purpose of acquiring a way of necessity, and the taking was, therefore, for a private, rather than a public purpose.

The identical point was raised in Deseret Ranches of Florida, Inc. v. Bowman,

supra, where Florida Statutes, Chapter 704, was challenged on the ground that the statute permitted the taking of property for a private, rather than a public, purpose. A majority of the Supreme Court held that the statute's purpose is predominantly public and the benefit to the private landholder is incident to the public purpose. Id. at 156. However, two justices dissented from the majority opinion on the question of whether the taking serves the public purpose. In a well reasoned dissent, Justice Sundberg declared that there was no showing that any dominant public purpose was served through the operation of Florida Statutes, Chapter 704, but that its dominant purpose was actually to serve the interest of a landlocked private landowner.

A substantial federal question has therefore been raised by the decisions of the Florida state courts, including the instant case, as to whether the statute permits the taking of property for a private, rather than for a public, purpose in violation of the servient landowner's rights to due process of law. The test in Florida has always been whether the purpose of taking private property was primarily public. The public purpose must not be merely incidental; "public benefit" is not synonymous with "public purpose."

Grubstein v. Urban Renewal Agency, 115
So. 2d 745 (Fla. 1959).

In <u>Grubstein</u>, <u>supra</u>, the Florida

Supreme Court sustained the constitutionality of the Urban Renewal Law

providing for the rehabilitation,

clearance, and redevelopment of slums

and blighted areas in the City of Tampa

in accordance with urban renewal plans,

holding that it served the public purpose. The dominant public purpose was

clearly stated to be the clearance of

slum areas which would improve traffic and safety conditions in the area, eliminate the disease, crime, fire hazard and other problems incident to slum conditions, and generally benefit the health, safety, morals and general welfare of all the citizens of the City of Tampa. Id. at 749.

In the case <u>sub judice</u> a "dominant public purpose" has not been shown to be served through the operation of Florida Statutes, Chapter 704. Obviously, the dominant purpose of the aforesaid statute is to serve the interests of a private property owner. Any benefit to the public derived from Sections 704.01(2) and 704.04 is incidental to the benefit flowing to the private landowner; a statutory way of necessity, therefore, provides at most a "public benefit" and not a "public purpose."

In the instant case, it is equally apparent that the property of the Plain-

tiff was taken for the primary benefit of the Defendants Folsom and FPC. The Defendants did not even establish that they were denied access to a public road by other adjacent property owners and it was never shown that a statutory way of necessity of Plaintiff's land would benefit the public. Citizens of the State of Florida are not affected or benefitted by the award of a statutory way of necessity to the Defendants of an easement across the Plaintiff's property, and the mere declaration of Florida Statutes, Section 704.01(2) that it is "based on public policy, convenience, and necessity" does not amount to a taking for "the public purpose." The aforesaid statutes which authorize the taking of the Plaintiff's property are therefore unconstitutional by violating the Plaintiff's due process rights as protected in the Fourteenth Amendment to the United States Constitution and his

property rights as guaranteed in Article I, Declaration of Rights, Section 2 and Section 9, and Article X, Section 6(a) of the Constitution of the State of Florida.

The danger of this infringement upon the due process rights and basic property rights of a landowner, particularly a property owner who is a citizen of a sister state, such as the Plaintiff, was enunciated by Justice Sundberg in his dissent to the majority opinion in Deseret Ranches of Florida, Inc. v. Bowman, supra. Justice Sundberg cautioned that

"It is an odious concept indeed that the awesome eminent domain power of the sovereign may be utilized by an individual to take for his own private use the private land of his neighbor against the will of the neighbor, regardless of the requirement that full compensation shall be paid. It is no consolation to assert that the right of way easement is temporary and shall exist only so long as it is reasonably necessary for the purposes stated in the statutes. If Section 704.01(2), Florida

Statutes, is held not to violate Article X, Section 6(a), then there can be no rational basis to restrict the power of the legislature to delegate the authority to take permanently."

Justice Sundberg's remarks are well taken; at its very essence, the statutory way of necessity imposed upon the Plaintiff's land by Florida Statutes, Chapter 704, is simply a taking of a person's land by one private property owner for his benefit to the detriment of the owner whose land is being taken. If the taking no longer stands on the same footing as an eminent domain procedure, the statutory way of necessity in this case occurs without even the auspices of an act by or on behalf of the citizens of the State of Florida. As there is no showing of any dominant public purpose to be served through the operation of Florida Statutes, Chapter 704, the statute is unconstitutional on its face.

The manner of the taking of Plaintiff's property pursuant to Florida Statutes, Sections 704.01(2) and 704.04 violated Plaintiff's rights to due process of law.

A review of the facts in the instant case as set forth in the record on appeal demonstrates that the manner of the taking of the Plaintiff's property pursuant to a statutory way of necessity under Florida Statutes 704.01(2) and 704.04 blatantly violated the Plaintiff's rights to due process of law as protected in the Fourteenth Amendment to the United States Constitution. A substantial federal question exists as to violation of the Plaintiff's due process rights by the conduct of the Defendants and the procedure followed by the trial court with respect to the taking of Plaintiff's property.

Florida Statutes, Sections 704.01(2) and 704.04 set forth the procedure to be followed by a property owner who is

deprived of a practicable route of ingress or egress to his property and has need for a statutory way of necessity. According to the aforesaid statutes, such a property owner may petition the circuit court for a statutory way of necessity when his neighbor, owner or owners objects or refuses to permit his use of their property. obvious intent of the Florida legislature, expressed in Florida Statutes, Sections 704.01(2) and 704.04, is for the hemmed-in owner to petition the court for relief only when he has no other alternative to gain ingress and egress to a public road from his property.

The aforesaid procedure for the statutory easement obviously was intended to protect the due process rights of the property owner whose land is subject to be taken by an award of a statutory way of necessity. Implicit in the language of the statute is the

requirement that the hemmed-in landowner has, in fact, been denied access to a public road by his surrounding neighbors. If the neighbors object or refuse the use of their property, the circuit court may then, upon petition of the hemmed-in party, rule whether a statutory way of necessity should be granted and determine which route is most practicable.

The record in the instant case reveals a blatant trespass by the Defendants Folsom and Florida Power Corporation upon the Plaintiff's property. The procedure set forth in Florida Statutes, Sections 704.01(2) and 704.04 as previously described, was never followed by the said Defendants. The Plaintiff was never contacted by the Defendants for permission to cross his property, nor were Defendants Folsom refused access by other adjoining property owners, and the Plaintiff never

had an opportunity to consent or object to the use of his property by the Defendants (A 164, 168, 175-178).

Further, the Defendants never petitioned the circuit court to have a judicial determination as to whether they were hemmed-in as required by the statute to entitle them to the relief provided until after they had first unlawfully trespassed upon the Plaintiff's property. Without first contacting the Plaintiff or petitioning the circuit court for statutory relief, the Defendants Folsom built a clay road with six inches to twelve inches depth of clay, approximately twenty feet wide and over 1,500 feet in length upon the lakefront portion of Plaintiff's property (A 179-184). Upon learning of the trespasses upon his property the Plaintiff erected a fence and posted "no trespassing" signs to protect his property. The fence was torn down within 48 hours after its

construction by the Plaintiff (A 185-188).

Notwithstanding their actual knowledge of the Plaintiff's objection to the use of his property, the Defendants Folsom blatantly ignored the Plaintiff's property rights and continued to trespass upon the Plaintiff's property (A 189-196). Further, the Defendants Folsom directed the Defendant Florida Power Corporation to trespass upon Plaintiff's property and construct a utility line to their property (A 191-194). Three poles with lines traversing the shore line of Flat Lake were placed on the Plaintiff's property on or about November 6, 1973, by the Defendant Florida Power Corporation's employees, because the employees followed a company policy of not making any effort to look at the public records of land ownership or contacting a landowner before installing a distribution line upon the Plaintiff's property (A 197-239).

The Defendants Folsom and FPC never petitioned the court for a statutory way of necessity until after the Plaintiff filed suit against the said Defendants in the Circuit Court of Lake County for wilful trespass upon his property; the request for a statutory easement was raised by the said Defendants as an affirmative defense to the Plaintiff's action in an effort to purge themselves after the fact of their intentionally illegal acts (A 46-77).

that the subsequent taking of the Plaintiff's property by the trial court pursuant to Florida Statutes, Sections 704.01(2) and 704.04 amounted a taking of the Plaintiff's property without due process of law after an unlawful trespass, because the Defendants Folsom and FPC had not followed the required procedure for petitioning the court for statutory relief and therefore did not have

defense of a statutory way of necessity to absolve themselves of their responsibility for their intentional trespass upon the Plaintiff's property. This abuse of the Plaintiff's due process rights was sanctioned by the trial court in awarding the statutory way of necessity and the appellate courts affirming the aforesaid easement in the face of the Plaintiff's constitutional attacks on the taking of his property pursuant to the aforesaid statutes.

It should be readily apparent to this Court that a substantial federal question exists as to whether procedure followed by the Defendants in taking the Plaintiff's property pursuant to Florida Statutes, Sections 704.01(2) and 704.04, violated the Plaintiff's rights to due process of law. The aforesaid statutes, as construed by the trial court and the Florida appellate courts below, author-

ize the taking, notwithstanding the Defendants' flagrant trespass, and are therefore unconstitutional because they deny the Plaintiff his rights to due process as protected by Section Twelve of the Declaration of Rights of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States. To allow the Plaintiff's property to be taken under these statutes in derogation of the proscribed procedure for petitioning for relief under the aforesaid statutes violates his aforementioned constitutional rights. As the Defendants illegally initiated the taking by committing a trespass upon the Plaintiff's property, the award of the statuory way of necessity, pursuant to Florida Statutes, Sections 704.01(2) and 704.04, which are statutes in derogation of the common law which have not been strictly construed by the Florida courts

but, instead, have been construed to violate the Plaintiff's constitutional rights as aforesaid. For these reasons, Florida Statutes, Sections 704.01(2) and 704.04 should be declared unconstitutional by this Court and the decisions of the Florida courts below reversed.

Florida Statutes, Sections 704.01(2) and 704.04 are unconstitutional because these statutes fail to provide just compensation for the taking of the Plaintiff's property in violation of the Plaintiff's rights to due process of law. In the alternative, the Florida state courts below violated the Plaintiff's due process rights by failing to tax attorneys' fees against the Defendants for the expenses the Plaintiff incurred in proving his damages and defending the taking of his land.

As stated earlier, in 1952 the Florida Supreme Court declared Florida Statutes, Section 704.01 (1951) unconstitutional on the ground that the aforesaid statute ran afoul of the due process clause by permitting the taking

of private property for a private,
rather than public purpose, and by reason of its failure to provide just
compensation for the taking of property.

South Dade Farms, Inc v. B&L Farms
Company, supra, at 351. This fatal constitutional defect has not been remedied
by the Florida legislature in the amended
statute, Florida Statutes, Chapter 704
(1953), nor has the Florida Supreme
Court ruled that the amended statute as
passed corrects this defect.

While Florida Statutes, Section
704.01 was amended in 1953 in an attempt
to conform with the South Dade Farms
decision, supra, a substantial federal
question is raised as to whether Florida
Statutes, Chapter 704, violates a person's constitutional rights to due
process of law when it authorizes the
taking of private property as a "statutory way of necessity" without providing
the injured landowner just compensation.

At the heart of this problem lies an inconsistency in the opinions of recent decisions, by the Florida Supreme Court, including the case <u>sub judice</u>, upholding the constitutionality of the aforesaid statutes but denying the right to tax attorneys' fees as just compensation for the taking of property pursuant to a statutory way of necessity.

The root of this problem is found in the decision of the First District Court of Appeal in Stein v. Darby, supra, when that court pronounced that the legislature delegated the power of eminent domain to a landlocked property owner for the purpose of acquiring an easement on the condition that full compensation was paid to the owner. Id. at 321. In support of this position, the court cited Article XVI, Section 29, of the Florida Constitution, which provided that no private property could be appropriated until full compensation

as determined by a jury is first paid to the owner. <u>Id</u>. The nature of a statutory way of necessity proceeding under this statute was therefore clearly identified by the appellate court as a proceeding in eminent domain.

In Florida, attorneys' fees are recognized as a cost to be awarded in eminent domain cases pursuant to Florida Statutes, Section 73.091, regardless of whether the condemnee's land is actually taken. Dade County v. Oolite Rock Co., 311 So. 2d 699 (Fla. 3d DCA 1965). Moreover, Florida appellate courts have traditionally held that just compensation requires that attorneys' fees be awarded to the property owner in eminent domain proceedings and inverse condemnation actions. Jacksonville v. Schumann, 223 So. 2d 749 (Fla. 1st DCA 1969); Broward County v. Bouldin, 114 So. 2d 737 (Fla. 3d DCA 1959). As the authority for the taking by a statutory

way of necessity emanated from the legislature's power of eminent domain, it would logically seem that just compensation under Florida Statutes, Section 704.04 required the taxing of attorneys' fees, similar to eminent domain proceedings.

Support for the position that attorneys' fees should be included as just compensation for property taken by a statutory way of necessity is found in federal and state decisions speaking to due process of law guarantees where the states exercise their police power. The states do not have the power and authority to appropriate private property for a public use without paying just compensation to the property owner whose land the state is taking. The United States Constitution and supporting decisions uphold the right of an owner of land to receive reasonable compensation when his private property is appropriated for

public use. Chicago B&Q Railroad Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341 (1906); Lamm v. Volpe, 449 F. 2d 1202 (10th Cir. 1971); State v. Stewart, 120 So. 335 (Fla. 1929). While the constitutional guarantee against the taking of private property without just compensation has been restricted by some jurisdictions to eminent domain proceedings, the Florida Supreme Court has given greater significance and broader effect to these due process of law rights. State v. Stewart, Id. at 349.

The logic for providing attorneys'
fees as just compensation for the taking
of private property was expressed in the
opinion of <u>In re Board of Rapid Transit</u>

<u>Railroad Commissioners</u>, 128 Appellate

Division of New York 103, 112 N.Y.Supp.
619 (S.Ct. of N.Y. 1908), where the
court noted that such compensation was
amply justified by the equities of the
situation. As stated by the court, the

property is taken from an unwilling landowner through the exercise of the high powers of the state; the spirit of the Constitution requires that he should not be required to lose his property without being compensated for all the necessary expenses, including attorneys' fees incurred in defending his property rights. Id. at 636, 637.

Notwithstanding these principles as enunciated by this Honorable Court and other jurisdictions, including the Supreme Court of Florida, as aforesaid, and in the face of the clear language of Stein v. Darby, supra, the Second District Court of Appeal and the Florida Supreme Court, in construing Florida Statutes, Sections 704.01(2) and 704.04, have ruled in the instant case that attorneys' fees were not recoverable in statutory way of necessity actions. These courts have apparently relied upon the decision of the Florida Supreme

Court in Estate of Hampton v. Fairchild Florida Construction Co., 341 So. 2d 759 (Fla. 1976). The Florida Supreme Court concluded in the Hampton decision that proceedings to establish a statutory way of necessity do not stand on the same footing as condemnation actions by the State of Florida in its sovereign capacity. Id at 761. Referring to the proceeding for a statutory way of necessity, the Court noted that the present situation differs from the delegation of the power of eminent domain to railroad, canal, telephone, and telegraph companies. Id., n.4.

In the latest decision by the

Supreme Court of Florida concerning the

constitutionality of Florida Statutes,

Chapter 704, Deseret Ranches of Florida,

Inc. v. Bowman, supra, the Florida

Supreme Court contradicted its decision

in Hampton, supra, in upholding the

constitutionality of Florida Statutes,

Sections 704.01(2) and 704.04 on the specific ground that the statutes authorized the taking of private property for a public, rather than a private, purpose. Notwithstanding the Hampton decision, supra, the "public purpose" nature of the statutory way of necessity proceeding can be characterized only as an exercise of the power of eminent domain. In Adams v. Housing Authority, 60 So. 2d 633 (Fla. 1953), the Florida Supreme Court defined the power of eminent domain as "(T)hat sovereign power to take property for a public use or purpose, and this cannot even be done without just compensation." (Emphasis supplied.)

In the very words of the Florida

Supreme Court in Adams v. Housing

Authority, supra, a taking of property

for a public use is an exercise of the

power of eminent domain and just com
pensation must be awarded for the

taking of the property. Further, the Florida legislature and the Florida Supreme Court have recognized that attorneys' fees must be awarded as just compensation to a property owner in an eminent domain proceeding. It follows, therefore, that a taking of property as a statutory way of necessity for the public purpose is an exercise of the power of eminent domain and attorneys' fees must be awarded as just compensation for the taking. The Deseret opinion therefore conflicts with the clear language of the Supreme Court in Hampton, supra, disclaiming any relationship of a statutory way of necessity proceeding to a condemnation action by the State of Florida in its sovereign capacity.

In considering the violation of the Plaintiff's due process rights in the case sub judice, several alternative courses of action are open to this Court. To begin with, Florida Statutes,

Chapter 704, as construed by the Florida appellate courts in the instant case, violates the Plaintiff's rights to due process of law by failing to provide just compensation for the taking of his property. The statutes should be declared unconstitutional on the ground that a statutory way of necessity is an exercise of the power of eminent domain and Florida Statutes, Chapter 704, fails to provide attorneys' fees as just compensation for this taking of property as required by the Florida Constitution (see Broward County v. Bouldin, supra,) and the Fourteenth Amendment to the United States Constitution.

In the alternative, if this Court holds that Florida Statutes, Sections 704.01(2) and 704.04, are constitutional as providing just compensation to the affected landowner, it should rule that the Florida courts below violated the Plaintiff's due process rights by fail-

ing to award Plaintiff his reasonable expenses, including attorneys' fees, as contemplated under the statute. In this event, this Court should instruct the trial court below to award the Plaintiff his reasonable attorneys' fees as just compensation for defending his property rights at trial and on appeal.

In the event this Court determines that Florida Statutes, Chapter 704, does not contemplate an exercise of the power of eminent domain and that attorneys' fees are not to be awarded as just compensation, the statutes must also be declared unconstitutional as violating the due process rights of the Plaintiff. If a statutory way of necessity is not a delegation of the power of eminent domain, then Florida Statutes, Sections 704.01(2) and 704.04 blatantly permit a taking of private property for a private purpose, rather than a public purpose, in violation of the Plaintiff's due

process rights as protected under the

Fourteenth Amendment of the United

States Constitution and Article I,

Declaration of Rights, Section 9, of the

Constitution of the State of Florida.

Finally, the unique facts of the instant case demonstrate that the taking of the Plaintiff's property by the Defendants Folsom and FPC, through the courts of the State of Florida, transgress the Plaintiff's rights to due process of law. Even if Florida Statutes, Chapter 704, is considered to be constitutional by this Court, the procedural due process guarantees provided for in Florida Statutes, Section 704.04, have been intentionally ignored by the Defendants Folsom and FPC in the instant case, as described earlier in this brief. The aforesaid trespass by the Defendants deprived them of any standing to petition for relief under Florida Statutes, Chapter 704.

Further, the award of the statutory way of necessity as affirmed by the appellate courts below in the face of the outrageous trespass committed by the Defendants made a mockery of any due process rights afforded to the Plaintiff pursuant to Florida Statutes, Section 704.04. On these grounds, therefore, the Florida courts below violated the Plaintiff's due process rights as protected in the Constitutions of the United States and the State of Florida by authorizing the statutory way of necessity across the Plaintiff's land, notwithstanding the Defendants' trespass.

Any other interpretation by this Court would result in the contradiction and confusion of logic that is so readily apparent in the <u>Hampton</u> and <u>Deseret</u> decisions of the Florida Supreme Court, <u>supra</u>. Either Florida Statutes, Sections 704.01(2) and 704.04 are uncon-

stitutional, or the Plaintiff is entitled to be awarded his attorneys' fees
as just compensation has been determined
by the Florida courts in all other
instances in which private property is
taken. If the statutes are unconstitutional the Defendants must be found by
this Court to have wilfully trespassed
upon the Plaintiff's property and
instructions should be entered for a new
trial on the issue of compensatory and
punitive damages to be assessed against
the Defendants Folsom and FPC.

Florida Statutes, Sections 704.01(2) and 704.04, as construed by the Florida state courts below, are unconstitutional by permitting the taking of the Plaintiff's property in violation of his rights to equal protection under the law.

The rulings of the Florida Supreme

Court in <u>Hampton</u> and <u>Deseret</u>, <u>supra</u>,

create different standards of relief for

real property owners that depend upon

the method by which the property is

taken. Those fortunate enough to have their property taken by eminent domain or inverse condemnation proceedings will be afforded their due process rights and will be entitled to just compensation, including their attorneys' fees, while those unfortunate enough, like the Plaintiff, to have their property taken by a statutory way of necessity under Florida Statutes, Chapter, 704, are not protected and will not receive just compensation, including their attorneys' fees. Such a discriminating situation not only transgresses the due process rights of the Plaintiff: it also violates his constitutional guarantees to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and provided by Article I, Section 2, Declaration of Rights, Florida Constitution.

This arbitrary discrimination is

particularly evident in the instant case when attention is focused upon the conduct of the Defendant Florida Power Corporation. If the Defendant FPC had initiated condemnation proceedings against the Plaintiff for a utility easement across the Plaintiff's property the Plaintiff would have been afforded his due process quarantees for the taking of his property and just compensation would include attorneys' fees. Certainly, FPC would not have constructed its distribution line upon the Plaintiff's property until a court order had been entered granting an easement to FPC.

In the instant case, however, the property rights of the Plaintiff were intentionally violated by the wilful trespass of the Defendant FPC upon the Plaintiff's property but the Defendant was permitted a statutory way of necessity across the Plaintiff's land without

being obligated to pay the Plaintiff's attorneys' fees and without an order of taking having been first obtained. Based upon the testimony and the evidence presented at trial, the trial court ruled that FPC followed a policy when installing its distribution lines across private property that wilfully violated the property rights of landowners in the state, including the rights of the Plaintiff (A 94). Legal descriptions were never checked, maps and aerial photographs were not reviewed, and surveys were not taken (A 197-239).

As a matter of fact, the trial court found that no single employee of FPC admitted he made a mistake in failing to ascertain the landowners and obtain their consent prior to going upon their land and installing its lines; the cause of error was blamed on the policy of FPC for the installation of the distribution line (A 96). According to

the trial court, the evidence revealed that FPC took risks at the expense of property owners by placing its distribution lines and poles on property without bothering to check courthouse landownership records, legal descriptions, aerial photographs or maps, all of which were readily available to them and were, in fact, used when rights of way were sought for transmission lines (A 197-239).

In spite of this blatant trespass, the trial court and the appellate courts below construed Florida Statutes, Chapter 704, to authorize the taking of the Plaintiff's property in the instant case as a means of egress and ingress for the Defendants Folsom and to provide an easement for electrical service by the Defendant FPC for the benefit of the Defendants Folsom. The Plaintiff was not afforded his due process rights as provided in Florida Statutes, Chapter

704, which required the Defendants to first petition the court for relief, and the Plaintiff was denied his right to an award of attorneys' fees as just compensation for the taking of his property. In contrast to the outrageous conduct of the Defendants FPC and Folsom in the manner in which they trespassed on the Plaintiff's property in the instant case in the face of the Plaintiff's signs, fence, and expressed request for Folsom to stay off his property, if the same property of the Plaintiff were acquired by eminent domain proceedings initiated by the Defendant FPC through recognized legal process, the Plaintiff would have been assured his rights to due process of law prior to the taking of his property and he would have been entitled to his attorneys' fees incurred in defending his property rights as just compensation for the taking of his property.

It is apparent, therefore, that

Florida Statutes, Sections 704.01(2) and 704.04, as construed by the Florida courts below, create an arbitrary and unreasonable class of property owners in the State of Florida which denies due process of law, including just compensation for the taking of property, to those property owners whose land is subject to a statutory way of necessity. In Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1962), this honorable Court provided that the test for the validity of classification created by statutes, as in the case sub judice, is whether or not the line drawn is rational. Further, a statutory classification must bear some rational relationship to a legitimate state purpose. Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977). This Court has traditionally exercised strict scrutiny for equal protection purposes where statutory classifications approach sensitive and fundamental

rights. Id. at 767.

Turning to the case sub judice, a substantial federal question exists as to whether the statutes in question have created an arbitrary and unreasonable classification in violation of the Fourteenth Amendment and the aforesaid decisions of this Court construing the Equal Protection Clause. There is no logical basis to a statute that discriminates against a class of property owners whose land is taken pursuant to a statutory way of necessity by denying their right to procedural due process quarantees and to just compensation for the taking of their property. The Florida courts below have forgiven the trespass of the Defendants and the wilful transgression of the Plaintiff's property rights by the said Defendants in the name of a statutory way of necessity, and have added further insult by denying the Plaintiff his right to tax

attorneys' fees as just compensation for the taking of his property. Certainly, this discrimination against the Plaintiff and similar property owners bears no rational relationship to any legitimate state purpose. As the State of Florida, through Florida Statutes, Chapter 704, construed by the Florida courts below, patently violates the Plaintiff's rights to equal protection under the law, the aforesaid statute must be declared unconstitutional by this Court.

# CONCLUSION

The taking of Plaintiffs' property as a statutory way of necessity pursuant to Florida Statute Chapter 704, as construed by the Florida courts, raises substantial federal questions as to an apparent violation of the Plaintiffs' rights to due process of law and equal protection under the law as protected by the Fourteenth Amendment to the United States Constitution. The Plaintiffs' fundamental property rights have been violated by the enforcement of the Statute by the Florida courts below and rights of similar property owners will continue to be violated unless this Court takes jurisdiction of this Appeal.

For reasons set forth above,
Florida Statute, Sections 704.01(2) and
704.04 are repugnant to the Fourteenth

Amendment of the United States Constitution by taking private property for private, rather than public purpose, in violation of the Plaintiffs' rights to due process of law; further, the manner of taking of Plaintiffs' property in the case sub judice as upheld by the Florida courts violates the Plaintiffs' due process rights; in addition, the Statutes transgress Plaintiffs' rights to due process of law by denying just compensation for the taking of his property and the Statutes create an arbitrary classification of property owners whose property is taken by statutory way of necessity in violation of their rights of due process of law.

Furthermore, the opinions of
the Florida Supreme Court and the District
Courts of Appeal construing the aforesaid
Statutes have created much confusion as
to the constitutionality of the Statutes.

By taking jurisdiction of this Appeal, this Court can protect the fundamental property rights of landowners of this state by ruling on the constitutionality of Florida Statutes, Chapter 704, and stating the specific grounds for the holding, regardless of the validity of the statute.

The United States Constitution protects the rights of the citizens of this country to own real property. A citizen's property may only be taken for public uses and purposes, but the owner must be made whole again for that which is taken from him for a public purpose. Here, a parcel of land owned by the Appellant Scudder 30 feet wide and over 1,500 feet long consuming over one acre of lakefront land has been taken from him against his will for a private purpose following an intentional tort in trespass and the Appellant has been granted

only a nominal dollar award for the land. This sum does not begin to make him whole again since he has expended more than \$30,000.00 in defending his constitutional rights, not to mention the court costs and appellate costs that Defendant Florida Power Corporation seeks from the Appellant Scudder because it "won" its appeal in the state courts. The Appellant's last resort for justice lies with this honorable Court.

Accordingly, this Court should enter its Order noting probable jurisdiction of the case <u>sub judice</u>. By taking jurisdiction of the instant case, the constitutional rights of property owners of the State of Florida will be safeguarded and, further, the Bar of this state will be greatly benefited by a clarification of the constitutional issues concerning the taking of property by a statutory way of necessity

as provided in Florida Statutes, Chapter 704.

Respectfully submitted,

ACK B NICHOLS, Esq., of NICHOLS & TATICH, P. A. 108 E. Hillcrest Street Post Office Box 33 Orlando, Florida 32802 Telephone 305/841-8823 Attorneys for Plaintiff/ Appellant

# PROOF OF SERVICE

I, JACK B. NICHOLS, of Nichols & Tatich, P. A., attorneys for Gilbert D. Scudder, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of September, 1978, I served three copies of the foregoing Statement of Jurisdiction on each of the several parties thereto, as follows:

On FLORIDA POWER CORPORATION, L. M. FOLSOM and PAULINE FOLSOM, by hand delivery to their respective attorneys of records, as follows:

To C. BRENT McCAGHREN, Esquire,
Attorney for Florida Power Corporation,
250 Park Avenue South, Winter Park,
Florida 32789;

To JOHN H. RHODES, JR., Esquire, Attorney for L. M. Folsom and Pauline

Folsom, 535 South Dillard Street, Winter Garden, Florida 32787.

OACK B. NICHOLS, Esq. of NICHOLS & TATICH, P. A. 108 E. Hillcrest Street Post Office Box 33 Orlando, Florida 32802 Telephone 305/841-8823 Attorneys for Plaintiff/ Appellant